

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2001 Term

**FILED**

December 12, 2001  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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No. 29005

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**RELEASED**

December 12, 2001  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

ALISHA JOHNSON, AS PERSONAL REPRESENTATIVE FOR  
THE ESTATE OF GEORGE ROBERTSON,  
Plaintiff Below, Appellant,

v.

C. J. MAHAN CONSTRUCTION COMPANY,  
A FOREIGN CORPORATION; JANSSEN AND SPAANS  
ENGINEERING, A FOREIGN CORPORATION;  
WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,  
DIVISION OF HIGHWAYS; DYWIDAG SYSTEMS INTERNATIONAL,  
INC., A FOREIGN CORPORATION,  
Defendants Below, Appellees,

STATE BOARD OF RISK AND INSURANCE MANAGEMENT,  
Appellee

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Appeal from the Circuit Court of Logan County  
Honorable Eric H. O'Briant, Judge  
Civil Action No. 98-C-372-O

REVERSED AND REMANDED

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Submitted: October 3, 2001  
Filed: December 12, 2001

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE DAVIS, deeming herself disqualified, did not participate in the decision of this case.

JUDGE ROBERT BURNSIDE, sitting by temporary assignment.

JUSTICE MAYNARD dissents.

JUDGE BURNSIDE dissents and reserves the right to file a dissenting opinion.

## SYLLABUS BY THE COURT

1. “Appellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.” Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

2. “*W.Va. Code*, 29-12-1 [1994] evidences a remedial legislative purpose that the State establish mechanisms that will assure that the State is financially responsible and accountable for injuries occasioned by culpable State action.” Syl. Pt. 6, *Russell v. Bush & Burchette, Inc.*, No. 28398, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (filed November 28, 2001).

3. “There is a public policy that the full range of rights provided to workers under West Virginia law should protect and be available to workers on a West Virginia state-funded construction project.” Syl. Pt. 3, *Russell v. Bush & Burchette, Inc.*, No. 28398, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (filed November 28, 2001).

4. “The requirement of selecting a ‘responsible bidder’ in *W.Va. Code*, 17-4-19 [2000] does not impose a mandatory duty upon the West Virginia Department of Transportation/Division of Highways (‘DOH’) to ascertain and take into account the worker safety history or performance of a contractor/bidder; however, this language does require the DOH to

ascertain and take reasonable steps to assure the financial responsibility of a contractor/bidder for accidents and injuries to workers on a state-funded project. Such financial responsibility must include full compliance with West Virginia workers' compensation laws, including showing adequate insurance or other resources to cover damages arising from 'deliberate intention' claims under *W.Va. Code*, 23-4-2 [1994]." Syl. Pt. 7, *Russell v. Bush & Burchette, Inc.*, No. 28398, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (filed November 28, 2001).

Per Curiam:

Alisha Johnson (hereinafter “Appellant”), as personal representative for the estate of George W. Robertson, appeals from the October 7, 1999, order of the Circuit Court of Logan County, granting dismissal of the West Virginia Department of Transportation, Division of Highways (hereinafter “WVDOH”), as a party in a personal injury action.<sup>1</sup> Appellant contends that the trial court erred by granting the dismissal on the ground that the State’s liability insurance does not extend coverage to negligent selection and retention of a general contractor by WVDOH.

Upon review of the briefs, the pertinent record, and arguments of counsel, we reverse the decision of the lower court and remand the case for reinstatement of WVDOH as a party.

### **I. Factual and Procedural Background**

On or about October 29, 1996, George W. Robertson died while working on a bridge construction project in Logan County as an employee of Mahan Construction Company (hereinafter “Mahan”). Mahan had been retained by WVDOH as the general contractor for the bridge project. Robertson died after he was struck and knocked off the bridge by a rod or bar that separated from the structure,<sup>2</sup> causing him to fall 80 to 120 feet. Appellant filed a wrongful death injury suit on behalf of

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<sup>1</sup>Following the initial oral argument, this Court made the Board of Risk and Insurance Management a party to this litigation as the statutorily-designated agency to determine the scope of insurance coverage authorized by West Virginia Code § 29-12-5(a) (1996) (Repl. Vol. 2001).

<sup>2</sup>The rod or bar was being elongated under pressure when it broke from its mooring.

her father's estate in the Logan County Circuit Court on October 27, 1998, naming as defendants WVDOH, Mahan, the engineering firm involved with the project and the supplier of certain construction materials associated with Robertson's death.<sup>3</sup>

Through the complaint, appellant sought to charge WVDOH with negligence with regard to the following: hiring, retaining, supervising and monitoring Mahan; awarding the contract to Mahan without investigating the company's past safety record; granting or accepting Mahan's bid project bid solely on the basis that it was the lowest bidder; failing to follow the customary private industry practice of pre-qualifying contract candidates; and failing to inspect Mahan's work on a regular and continual basis. The allegations of the complaint, however, did not include an averment that recovery against WVDOH was sought pursuant to the state's insurance contract.<sup>4</sup>

On November 23, 1998, in lieu of answering the complaint, WVDOH filed a motion to dismiss for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the West Virginia Rules of

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<sup>3</sup>WVDOH is the only defendant below involved in this appeal.

<sup>4</sup>We held in syllabus point three of *Parkulo v. West Virginia Board of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996), that "this Court will not review suits against the State brought under the authority of W.Va. Code § 29-12-5 unless it is alleged that the recovery sought is limited to the applicable insurance coverage and the scope of the coverage and its exceptions are apparent from the record." We were generous in granting this appeal despite the omission in the pleadings of this allegation related to insurance coverage, because the limitation, scope of coverage and exceptions were argued below. Nonetheless, future litigants should adhere to the requirement this Court announced in *Parkulo*.

Civil Procedure. In support of its motion, WVDOH relied on the provisions of *Pittsburgh Elevator v. West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983),<sup>5</sup> to argue that it was immune from suit under the provisions of Article VI, § 35 of the West Virginia Constitution<sup>6</sup> because the state’s liability insurance coverage did not extend to the WVDOH activities detailed in the complaint. Specifically, WVDOH contended that the selection and retention of a contractor in a bridge construction project was excluded under its liability insurance coverage because the bidding process constituted a “related or similar activity” within the meaning of those named activities excluded from policy coverage.<sup>7</sup> Appellant countered this argument by claiming that the exclusionary clause did not apply to WVDOH’s bid-related activities asserted in her complaint. In support of their respective

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<sup>5</sup>In syllabus point two of *Pittsburgh Elevator*, we stated that: “Suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State’s liability coverage fall outside the constitutional bar to suits against the State.” 172 W.Va. at 744, 310 S.E.2d at 676.

<sup>6</sup>West Virginia Constitution Article VI, § 35, commonly referred to as the sovereign immunity provision of our constitution, states:

The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

<sup>7</sup>Endorsement #7 of WVDOH’s liability policy, provided by the State Board of Risk and Insurance Management pursuant to the provisions of West Virginia Code Chapter 29, Article 12, contains the following exclusionary language:

[I]nsurance afforded under this policy does not apply to any claim resulting from the ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use, or control of . . . bridges . . . or related or similar activities . . . .

positions, both parties presented the disparate rulings of other circuit courts regarding the interpretations of the exclusionary clause in similar suits. By order dated October 7, 1999, the circuit court dismissed WVDOH from the suit on the grounds that WVDOH was entitled to rely on the state's constitutional immunity from suits for damages because there was no applicable liability insurance for the acts alleged in the complaint. Appellant seeks a reversal of this ruling.

## **II. Standard of Review**

“Appellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.” Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

## **III. Discussion**

Appellant argues that the circuit court erred in dismissing WVDOH as a party because the precise language of the exclusionary clause of WVDOH’s liability policy does not specify activities related to the WVDOH bidding process. We had the opportunity to resolve the differing conclusions being reached by the circuit courts on the issue of whether the exclusionary language of the liability insurance policy of WVDOH and the provisions of West Virginia Constitution Article VI, § 35, preclude a negligence action against the WVDOH for its bidding activities in our recent decision of *Russell v. Bush & Burchette, Inc.*, No. 28398, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (filed November



28, 2001).<sup>8</sup>

We held in syllabus point six of *Russell* that “W.Va. Code, 29-12-1 [1994] evidences a remedial legislative purpose that the State establish mechanisms that will assure that the State is financially responsible and accountable for injuries occasioned by culpable State action.” Guided by this remedial purpose and our established legal principles of narrowly construing exclusionary provisions of insurance policies and of favoring local government liability over immunity, we concluded in *Russell* that the bidding process of WVDOH is anterior to bridge construction and as such is not a “similar or related” activity to those enumerated in the exclusionary clause of the WVDOH liability policy. \_\_\_ W.Va. at \_\_\_, \_\_\_ S.E.2d at \_\_\_, slip op. at 13-14.

Because the circuit court in the case *sub judice* reached the opposite conclusion in interpreting the identical insurance policy and exclusionary language, we must reverse the circuit court’s order dismissing WVDOH, and remand the case for further proceedings with regard to the allegations that WVDOH was negligent in its bidding process.

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<sup>8</sup>The case before us and *Russell* have evolved as companion cases on the issue of the extent of the State’s liability insurance coverage for WVDOH bid activities: Appellant relied upon the circuit court’s ruling in the Russells’ case in support of her argument to the lower court against dismissal of WVDOH as a party; the Russells filed an amicus curiae brief in this appeal. The appeals were not consolidated on Appellant’s motion because different judges were sitting by temporary assignment in the two cases.

To assist the lower court in conducting the proceedings involving WVDOH on remand, we further note our conclusions in *Russell* regarding the extent of WVDOH's duty to worker safety in the bidding process. The complaint in the instant case alleges that WVDOH has a worker-related duty in carrying out its bidder selection process to investigate a bidder's past safety record. A similar argument was raised in *Russell*, and we declined "to judicially impose a broad and novel duty in the area of worker safety" on WVDOH. \_\_\_ W.Va. at \_\_\_, \_\_\_ S.E.2d at \_\_\_, slip op. 15. Instead, we recognized the practices acknowledged by WVDOH during its oral presentation before this Court and held in syllabus point three of *Russell* that: "There is a public policy that the full range of rights provided to workers under West Virginia law should protect and be available to workers on a West Virginia state-funded construction project." \_\_\_ W.Va. at \_\_\_, \_\_\_ S.E.2d at \_\_\_. The application of this public policy to WVDOH's responsibilities in awarding construction contracts was defined in syllabus point seven of *Russell*:

The requirement of selecting a "responsible bidder" in *W.Va. Code*, 17-4-19 [2000] does not impose a mandatory duty upon the West Virginia Department of Transportation/Division of Highways ("DOH") to ascertain and take into account the worker safety history or performance of a contractor/bidder; however, this language does require the DOH to ascertain and take reasonable steps to assure the financial responsibility of a contractor/bidder for accidents and injuries to workers on a state-funded project. Such financial responsibility must include full compliance with West Virginia workers' compensation laws, including showing adequate insurance or other resources to cover damages arising from "deliberate intention" claims under *W.Va. Code*, 23-4-2 [1994].

\_\_\_ W.Va. at \_\_\_, \_\_\_ S.E.2d at \_\_\_.

#### **IV. Conclusion**

Accordingly, the order entered by the Circuit Court of Logan County dismissing WVDOH as a party is hereby vacated and the case is remanded to the circuit court for further proceedings consistent with this opinion.

Reversed and remanded.